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No. 88-1060

In The

Supreme Court of the United States

October Term, 1988

JOSEPH E. POWERS,

Petitioner,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF KINGMAN COUNTY, KANSAS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Kansas Court of Appeals err in concluding that petitioner possessed no constitutionally protected property interest in his employment that entitled him to a pretermination hearing in accordance with the Fourteenth Amendment to the United States Constitution?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents[1] respectfully request that this Court deny the petition for writ of certiorari, which seeks

[1] Respondents are the Board of County Commissioners of Kingman County, Kansas; Charles Arensdorf, Supervisor of the County Division of Highways and Solid Waste Management; Natvar H. Patel, County Engineer; and Joe Dirks, Lee Vangiesen and William Milford, County Commissioners. Only the Board of County Commissioners has an interest in the matters presented in the petition; petitioner's claims against the other respondents were dismissed below for reasons undisputed in the petition.

review of the Kansas Supreme Court's August 28, 1988, denial of review of the unpublished opinion of the Kansas Court of Appeals of June 24, 1988, Appendices A and B, respectively, to the petition.

Upon request of the parties, the trial court severed for trial the issue of the existence of a property entitlement. The pretrial order reflecting that procedure is attached hereto as Appendix A.[2] The issue was tried to the court on October 17, 1985. The trial court's memorandum of findings of fact and conclusions of law is attached hereto as Appendix B.

STATEMENT OF THE CASE

Respondents contest petitioner's statement of the case in several respects, only one of which will be elucidated here. Petitioner states that on January 21, 1980, the respondent Board of County Commissioners formally adopted a document entitled *Personnel Rules and Regulations*. Petitioner's entire claim of a protected property interest in his employment is based upon entitlements allegedly flowing from this document.

The personnel handbook was prepared by a planning group to which the County subscribed. (V. 2, Tr., 120-21.)[3] The *Personnel Rules and Regulations* were never adopted by resolution of the Board of County Commissioners. (V.

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[2] Petitioner's tort claims have been abandoned or resolved against him in the state court proceedings.

[3] All citations are to the record on file with the Kansas Court of Appeals.

2, Tr., 124, 125.) Rather, the booklets were distributed to department heads for reference purposes. (V. 2, Tr., 124, 125-26.) Department heads utilized the document merely as a guideline rather than as conditions of employment. (V. 2, Tr., 88, 103.) The *Rules* booklet was not the product of negotiations with any employee or group of employees (V. 2, Tr., 78, 88), nor did petitioner provide any input as to the content of the booklet. (V. 2, Tr., 43, 88.) Indeed, the *Rules* document was never distributed to employees, and petitioner himself possessed no copy. (V. 2, Tr., 43.) Petitioner admitted at trial that he did not continue his employment with Kingman County in reliance upon the *Personnel Rules and Regulations*. (V. 2, Tr., 43.)

REASONS FOR DENIAL OF THE WRIT

Review on writ of certiorari is restricted to those few cases in which "special and important reasons" justify this Court's intervention. Sup. Ct. R. 17. No such reasons exist here. This case raises familiar Fourteenth Amendment analyses amply defined by prior decisions. *See, e.g., Bishop v. Wood*, 426 U.S. 341 (1976). Review of this case would enmesh this Court in state law evidence questions regarding stipulations that have never been addressed by Kansas appellate courts, a clearly inappropriate role. Further, the Court would necessarily address state law employment contract issues that Kansas appellate courts have already resolved against petitioner in this highly fact-bound case. This case is not a worthy candidate for review by writ of certiorari.

Petitioner Had No Protected Property Interest in Continued Employment with Kingman County and Was Not Entitled to the Due Process Protections of the Fourteenth Amendment

Petitioner contends that the *Personnel Rules and Regulations* created an implied contract of employment rising to the level of an entitlement – a protected property interest – in continued employment. Therefore, petitioner argues, he enjoyed a right to a due process hearing prior to his discharge on January 5, 1982. The entire basis of plaintiff's argument is the *Rules* booklet. The trial court found that set of rules was never adopted by respondents and was not in force and effect when petitioner was discharged.

Petitioner correctly states that the parties stipulated that the *Rules* were adopted by the Board of County Commissioners on January 21, 1980. At trial, however, *both parties* elicited testimony that the *Rules*, in fact, were not so adopted, but were merely utilized by department heads as a reference source. A clearly erroneous stipulation does not bind a Kansas finder of fact. *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, 709, 512 P.2d 438, 441 (1973). Further, both parties waived the right to rely upon the stipulation by placing the "formal adoption" question in issue. A stipulation may be abandoned or waived by the acts of the parties. *See Peddicord v. Franklin*, 270 Md. 169, ___, 310 A.2d 561, 567 (1973). Petitioner's counsel acquiesced in respondents' counsel's exploration of the issue, then surveyed it himself. (V. 2, Tr., 125, 147-51.) Counsel's conduct was wholly inconsistent with any belief that the mistaken stipulation was binding. Clearly

it was waived and the trial court was at liberty to rule, as it did, that the *Rules* were not adopted.

A Kansas Board of County Commissioners is a creature of the State that may exercise only the powers granted by statute in the manner specified by statute. Kan. Stat. Ann. § 19-101a(a) (1987 Supp.) extends to a commission the authority to "transact all county business and perform such powers of local legislation and administration it deems appropriate . . . ." Under the circumstances here at issue, such powers are effectuated only "upon passage of a resolution of the board and publication in the official county newspaper." Kan. Stat. Ann. § 19-101a(b) (1987 Supp.). The *Personnel Rules and Regulations* relied upon by petitioner were not even adopted informally, let alone in accordance with the statutory standards. (V. 2, Tr., 124, 125; Minutes of Jan. 21, 1980, Commission meeting, Ex. 0, 119, 126.) On the basis of the witnesses and evidence, the trial court correctly found the *Rules* were not in force and effect at the time of petitioner's discharge.

The Kansas Court of Appeals ruled that even had the trial court considered itself bound by the erroneous stipulation, petitioner could not establish his claimed entitlement to continued employment on the basis of the *Rules* booklet. A Kansas employer may enact employment policies without establishing an implied contract when the policies are mere unilateral expressions of employer intent. Particularly is that true when the policies are adopted after an employee is hired; there is no bargaining or other employee input as to the policies; there is no indication of mutual intent to be bound. *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976).

The theory of an employment contract implied in fact may be upheld in Kansas in very limited circumstances, but not upon the sole basis of an employment manual. *Wulf v. City of Wichita*, 644 F. Supp. 1211, 1222 (D. Kan. 1986); *Morriss v. Coleman Co.*, 241 Kan. 501, Syl. 1, 738 P.2d 841, Syl. 1 (1987); *Riddle v. City of Ottawa*, 12 Kan. App. 2d 714, 718-19, 754 P.2d 465, 469-70 (1988), *rev. denied*, 243 Kan. No. 3 xxii (1988). Under Kansas standards, petitioner's reliance on the *Personnel Rules and Regulations* is clearly misplaced.

In Kansas, a public employee claiming a protected property right in public employment must base that claim in the state constitution, a statute, an ordinance, or a contract. *Stoldt v. City of Toronto*, 234 Kan. 957, 964, 678 P.2d 153, 160 (1984); *Riddle v. City of Ottowa*, 12 Kan. App. 2d 714, 716-18, 754 P.2d 465, 468-69 (1988), *rev. denied*, 243 Kan. No. 3 xxii (1988). Petitioner points to no such grounding for his claim for the best of reasons: it does not exist. The Kansas Court of Appeals correctly ruled against petitioner, and no further review is warranted.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE NINETEENTH JUDICIAL DISTRICT
DISTRICT COURT, KINGMAN COUNTY, KANSAS
CIVIL DEPARTMENT

JOSEPH E. POWERS, Plaintiff	)	
vs.	)	Case No. 82 C 54
THE BOARD OF COUNTY COMMISSIONERS OF KINGMAN COUNTY, KANSAS, et al., Defendants	)	(Filed October 17, 1985)

PURSUANT TO CHAPTER 60
OF KANSAS STATUTES
ANNOTATED

PARTIAL PRETRIAL CONFERENCE ORDER

Appearances

On Wednesday, October 9, 1985, the above-entitled matter comes before the Court, Hon. William H. Yandell presiding. Plaintiff appears by M. Ralph Baehr, his attorney, and all defendants appear by William A. Hensley, one of their attorneys, Curtis E. Watkins, Kingman County Attorney, also appearing of record.

Nature of Action

Plaintiff contends that he was terminated from employment by Kingman County, Kansas, which is admitted by defendants, it being plaintiff's contention that such termination (1) violated his civil rights and (2)

was retaliatory because plaintiff had made a workers' compensation claim against Kingman County, both (1) and (2) being absolutely denied by defendants, who content, among other things, that plaintiff was terminated only because Kingman County required an employee able to perform necessary work which was previously done by plaintiff.

Amendments, Clarifications and Orders

Plaintiff makes no claim for bodily injuries by reason of his termination. All claims for punitive damages against Kingman County have been dismissed.

Upon Motion of the individual defendants and upon hearing the statements, stipulations and arguments of counsel appearing, it was by the Court ordered that plaintiff's action against the individual defendants, personally, should be and the same were dismissed, all following statements as to the extent of available evidence.

Plaintiff's Contentions

Defendant, Kingman County, acting under color of state or local law, custom, usage and policies, and in violation thereof together therewith plaintiffs consitutional [sic] rights, violated plaintiff's civil rights (42 U.S.C.A. 1983) and wrongfully terminated plaintiff for filing a compensation claim. Plaintiff claims that he was entitled to and denied an opportunity to be heard with regard to his termination, in alleged denial of procedural due process he contends to have been an entitlement. Plaintiff claims he is entitled to relief as follows:

A. Judgment against the defendants in an amount yet to be determined which will fully compensate him for his lost wages which are ongoing, his mental anguish and suffering;

B. Reinstatement to his former position or a due process hearing;

C. Back wages as though plaintiff had been employed by the defendants to the time of trial herein;

D. Future wages until such time as the plaintiff is reinstated by the defendants in his former position;

E. Seniority status which plaintiff would have received had he been continuously employed by the defendants after his termination in January, 1982;

F. Reasonable promotions which the plaintiff would have received to the time of trial, including raises and fringe benefits;

G. All fringe benefits and values of insurance, including health and accident and disability and worker's compensation insurance to which the plaintiff would have been entitled had he been employed by the defendants.

Defendants' Contentions

Defendants deny that any of plaintiff's civil rights, if any are applicable, which is denied, have been infringed. Plaintiff was terminated solely because Kingman County required a road worker to do the job which the plaintiff had done previously. The Kingman County Personnel Rules and Regulations were not part of any contract of

employment between plaintiff and defendants and were adopted after plaintiff was hired. The fact that plaintiff properly filed a workers' compensation claim and has maintained it for a number of years, to the present date, both before and after his termination, had absolutely nothing to do with the fact of such termination.

Defendants incorporate by reference all allegations made in the Combined Answer of Defendants, filed herein, as amended by the Journal Entry entered as a result defendants' Motion filed on or about January 7, 1985. Defendants also incorporate all factual and legal contentions set forth in Defendants' Trial Brief and Defendants' Tentative Requested Jury Instructions.

Witnesses and Exhibits

Plaintiff lists Joseph E. Powers, Mrs. Joseph E. Powers, Clarence Henning, James Woodson, Ova Parsons, Verl Dennison, Del Wyman, Timothy Paul and all witnesses listed on behalf of defendants.

Defendants list Charles Arensdorf, Natvar H. Patel, Joe Dirks, Lee VanGiesen, William Milford, Donna R. Brown, Larry T. Solomon, Don D. Gribble, all past and present Commissioners, Kingman County records custodians and all witnesses listed on behalf of plaintiffs.

As exhibits, the parties list all documents obtained and/or exchanged in the course of discovery procedures, all personnel records of the plaintiff, all records pertinent to plaintiff's workers' compensation claim, the Personnel Rules and Regulations, Minutes of the Commission meetings relating to plaintiff and such other documentary

information exchanged in advance of trial which may be competent, relevant and material.

Mixed Issues of Law and Fact

1. Did plaintiff have an entitlement to continued employment and/or a hearing with regard to termination?

2. Was plaintiff's employment one terminable at the will of either party?

3. Has there been a deprivation of any constitutionally protected right of plaintiff?

~~4. If applicable in light of the above, did plaintiff demand a hearing and, if so, did Kingman County receive such demand and deny a hearing?~~

4.~~5~~. As a matter of common law, was plaintiff improperly terminated because he made a workers' compensation claim?

5.~~6~~. Were all actions of defendants in good faith, including but not limited to facts with regard to the advice of legal counsel, Larry T. Solomon, then County Attorney, as to the termination of plaintiff?

6.~~7~~. If applicable, to what relief is plaintiff entitled?

Further Order

Having heard the statements, stipulations and arguments of counsel appearing, it is by the Court considered, ordered and decreed as follows, to wit:

(1) The jury trial, scheduled for October 16, 1985, should be and the same is hereby continued to a future date as yet undetermined by the Court; and

(2) At 9:30 a.m. on Thursday, October 17, 1985, there shall be a hearing before the Court, with evidence if necessary, dealing with questions of law, properly determinable by the Court, in connection with plaintiff's claims that he has been denied procedural due process and that his civil rights have been violated.

IT IS SO ORDERED.

/s/ William H. Yandell
Judge of the District Court

Approved:

Nieto, Baehr & Hollander

By /s/ M. Ralph Baehr
Attorneys for Plaintiff

Curtis E. Watkins, Kingman County Attorney,
and
Sherwood & Hensley

By /s/ William A. Hensley
Attorneys for Defendants

APPENDIX B

IN THE DISTRICT COURT OF
KINGMAN COUNTY, KANSAS.

JOSEPH E. POWERS, Plaintiff,	)	
	)	
vs.	)	No. 82 C 54
THE BOARD OF COUNTY COMMISSIONERS OF KINGMAN COUNTY, KANSAS, et al.	)	(Filed March 11, 1987)
Defendants.	)	
	)	

FINDINGS OF FACT

1. The Plaintiff was hired under a CETA Program on March 1, 1978, as a laborer for the Road and Bridge Department.

The CETA Program was for one (1) year, and in March 1979, due to the termination of the CETA funding, Plaintiff was placed on the Kingman County payroll as an employee.

2. No formal written contract was entered into between Plaintiff and Defendant.

3. Plaintiff was employed by Defendant, in April, 1978, as a member of a trash collection crew, and suffered injury to his hand, arising out of and in the course of his employment with Defendant.

4. In 1978, Plaintiff was absent a total of 4 days due to this injury. The injury required surgery and in 1978 Plaintiff was absent 81 days, in 1980 Plaintiff was absent 38 days, and in 1981 Plaintiff was absent 145 days.

The days absent, were in addition to certain paid vacation times totaling 85+ days from 1978 thru 1981.

5. The Plaintiff was absent from work from July 14, 1981 through January 5, 1982.

6. On January 5, 1982, Defendant voted to terminate Plaintiff due to prolonged absences, and the need to have employees, available to perform their assigned jobs.

7. The Defendant informed Plaintiff on his termination by letter on February 19, 1982, and the basis of the grounds for termination.

8. The Plaintiff has never reapplied to Defendant, for employment, however Plaintiff was released from medical care in March 1982.

9. In late 1979, the Defendant agreed to have prepared and presented to them a booklet entitled "Kingman County Personal Rules and Regulations" for later adoption upon Defendant's approval.

This booklet was completed by an agency from Pratt, Kansas.

The various department heads of Defendant met and discussed various aspects of this book, but after completion and distribution the Defendant, never formally adopted the same.

10. The "Personal Rules and Regulations" were not in force and effect at the time Plaintiff was terminated, nor was he ever, or any other employee informed, they were employed under those Rules.

11. At the time of Plaintiff's employment and discharge, no Public Employee Union or Collective Bargaining Agreement, existed between Defendant and its employees.

12. Defendant entered into certain agreements, with Plaintiff furing [sic] the time of injury, to allow Plaintiff to maintain certain health insurance for Plaintiff's benefit and during the Workers Compensation Claim, by Plaintiff. The Defendant did not discharge Plaintiff, because of the Workers Compensation Claim, but in fact assisted Plaintiff in such insurance agreements.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the subject matter.

2. Kansas is an "at will" employment State, unless an expressed term of employment is contracted.

Under this theory an employer is entitled to discharge an employee at any time and for any reason.

3. The Plaintiff alledges [sic] a property interest under Federal Law based upon the never adopted rules and procedures of Kingman County, Kansas.

4. To be effective a County Commission must adopt procedures under the Laws of Kansas for the same.

Even had such rules been adopted by implication, they do not amount to an expressed contract of employment.

5. Absent an expressed contract of employment Plaintiff has no vesting of rights to continued employment.

6. Judgment must be for Defendant, upon Plaintiff's claim for relief.

Dated: March 10, 1987

/s/ William H. Yandell
William H. Yandell
District Judge